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AT

Administrative Tribunal

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2 November 1990
ENGLISH
ORIGINAL: FRENCH

ADMINISTRATIVE TRIBUNAL

Judgement No. 492

Case No. 548: DAUCHY

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Ahmed Osman, Vice-President; Mr. Francisco A. Forteza;

Whereas, on 27 April 1990, Jacqueline Dauchy, a staff member of the United Nations, filed an application the pleas of which read as follows:

"II. PLEAS

With regard to its competence and procedure, the Applicant respectfully requests the Tribunal:

(a) to find that it is competent to hear and pass judgement upon the present application under article 2 of its Statute;

(b) to consider the present application receivable under article 7 of its Statute.

...

The Applicant requests the Tribunal:

(1) to decide that the contested decision of the Secretary-General was tainted with errors of law;

(2) to decide that, in light of the moral and material injury which the Applicant sustained as a result of the violation of her statutory right to have her candidature duly considered, she be awarded

compensation equivalent to six months of her net base salary as at 11 April 1989, the date on which she filed an appeal with the Joint Appeals Board;

(3) to recommend to the Secretary-General that he take appropriate steps to ensure that the Applicant is informed of vacancies in D-2 positions for which she is qualified and in which she is interested;

(4) to recommend to the Secretary-General that he establish an appropriate joint machinery to review the Applicant's and other candidatures for future vacancies in D-2 positions."

Whereas the Respondent filed his answer on 27 July 1990;

Whereas the Applicant filed written observations on 13 August 1990;

Whereas, on 6 September 1990, the President of the Tribunal, pursuant to article 10 of the Rules of the Tribunal, put questions to the Respondent, to which the latter replied on 12 and 14 September 1990;

Whereas, on 11 October 1990, the Tribunal asked the Respondent for an additional document, which the latter produced on 15 October 1990, with a request to the Tribunal not to communicate it to the Applicant, since it concerned a staff member not involved in the case;

Whereas, on 31 October 1990, the Tribunal decided not to introduce into the proceedings the document produced by the Respondent on 15 October 1990, and to return it to him.

Whereas the facts in the case are as follows:

Jacqueline Dauchy, a national of France, entered the service of the United Nations on 10 August 1958. She was given a probationary appointment at the P-2, step I level, as a translator-trainee in the Department of Conference Services. On 1 August 1960, she received a permanent appointment and was promoted to the P-3 level as a translator. On 1 April 1964, she was promoted to the P-4 level as a reviser.

On 1 June 1967, the Applicant was transferred to the Codification Division of the Office of Legal Affairs. On 1 January 1974, she was promoted to the P-5 level as a senior legal officer. On 1 August 1980, she was promoted to the D-1 level as Deputy Director for Research and Studies. On 22 April 1987, her functional title was changed to that of Deputy Director of the Codification Division.

Since 1964, the post of Director of the Codification Division has been encumbered by various nationals of the Union of Soviet Socialist Republics (USSR). At the time of the developments that gave rise to these proceedings, the Soviet national in the post, Mr. Georgiy F. Kalinkin, was due to retire on 31 January 1989.

According to the statement of facts provided by the Respondent in his answer, the "question of the selection of a successor to Mr. Kalinkin ... arose initially in Spring 1988 when the Soviet Mission sent a Note proposing three candidates, and enclosing their Personal History Forms", which was "the normal method adopted for seeking the filling of a post pursuant to paragraph 4 of Section I of resolution 35/210 [of the General Assembly]". The Chef de Cabinet of the Secretary-General then asked the Legal Counsel "whether he would be prepared to consider another Soviet national to succeed Mr. Kalinkin". The Legal Counsel replied that "in order to avoid a change of Secretary of the Sixth Committee during the 43rd Session of the Assembly, he would insist that Mr. Kalinkin be extended [beyond the age of retirement] through the end of the Sixth Committee".

The Respondent goes on to state that "after having reviewed the internal candidates [from the Office of Legal Affairs] ... the Legal Counsel rejected two candidates [submitted by the Soviet Mission]", and that after interviewing the third candidate, Mr. Vladimir S. Kotliar, "[the Legal Counsel] on 9 September 1988, informed the Chef de Cabinet and the Office of Human Resources Management that he would be prepared to recommend Mr. Kotliar for appointment to the post of Director".

At the beginning of January 1989, the Applicant was informed by the Legal Counsel - who, according to his statement to the Joint Appeals Board, was aware that she was interested in the post of Director of the Codification Division - that it had been decided to appoint Mr. Vladimir S. Kotliar, another Soviet national, to replace Mr. Kalinkin.

On 11 January 1989, the Applicant requested the Secretary-General to review his decision to appoint Mr. Kotliar. In a reply dated 6 February 1989, the Assistant Secretary-General for Human Resources Management informed the Applicant that she had "not given sufficient grounds for conducting the review" she had requested, and that "in reaching the administrative decision

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regarding the filling of the D-2 post" in question, "due regard [had been] paid to the Charter, the Staff Regulations and other relevant General Assembly resolutions, the decisions of the Administrative Tribunal and established recruitment procedures". On 11 April 1989, the Applicant lodged an appeal with the Joint Appeals Board, which adopted its report on 6 December 1989. The Board's conclusions and recommendations read as follows:

"Conclusions and recommendations

44. The Panel concludes that:

- although promotions to D-2 posts are presently outside staff rule 104.14, they are governed by the Charter, Staff Regulations, relevant General Assembly resolutions, and decisions of the Administrative Tribunal;

- the Secretary-General restricted eligibility for the post of Director of Codification Division to only nationals of the Soviet Union;

- it was improper for the Secretary-General to apply the principle of replacement in the filling of the contested post;

- the appellant, as a staff member, had a statutory right to due consideration for the post, and this right was violated;

- the appellant failed to carry the burden of proof necessary to establish that she had not been considered for the contested post due to her gender;

- the prevailing machinery of appointing and or promoting candidates to D-2 posts is unclear and unsatisfactory and should be revised.

45. Accordingly, the Panel recommends that the appellant be considered fully and fairly with other candidates for vacancies in D-2 positions for which she is found to be qualified and in which she is interested.

46. The Panel also recommends that, in view of the overall circumstances of the case, the appellant should receive compensation for the injury she sustained as a result of the Administration's refusal to consider her candidacy for the post of Director of the Codification Division. This compensation should be in the amount of two months of her net base salary as at 11 April 1989, the date upon which she filed an appeal with the JAB."

On 5 March 1990, the Acting Under-Secretary-General for Administration and Management informed the Applicant of the following:

"...

The Secretary-General has re-examined your case in the light of the Board's report and noted that you were given due consideration for the post of Director, Codification Division, Office of Legal Affairs, in accordance with staff regulations 4.2, 4.3 and 4.4. The Secretary-General recalled that the Legal Counsel had reached the conclusion, taking into account all relevant circumstances, that it was in the best interests of the Organization to make his recommendation on the filling of the post which was approved by the Secretary-General.

Accordingly, the Secretary-General has decided to maintain the contested decision and to take no further action on the matter. The Secretary-General has further decided that you will be fully and fairly considered with other candidates for any vacant D-2 post for which you are qualified and interested.

..."

On 27 April 1990, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The policy of systematically filling posts of staff members on secondment from their Government, serving on fixed-term contracts with candidates of the same nationality, a policy which the Applicant refers to as the "preserve policy", is incompatible with several fundamental principles of the international civil service, the principle of non-discrimination and the principle of equal treatment.

2. The application of the "preserve policy" also results in the violation of the principle stated in Article 101, paragraph 3, of the Charter and in staff regulations 4.2 and 4.4.

3. The "preserve policy" is in violation of specific instructions of the General Assembly.

4. The Applicant was not given due consideration for the post in question.

Whereas the Respondent's principal contentions are:

1. The Applicant is entitled to consideration for promotion to D-2 posts for which she may reasonably be regarded as qualified.

2. The Applicant was considered for promotion to the position of Director of the Codification Division of the Office of Legal Affairs.

3. The mere fact that one Soviet national (Mr. Kotliar) succeeded another Soviet national (Mr. Kalinkin) cannot be deemed to be improper, as such replacements are specifically authorized by the General Assembly, which has full authority to regulate the recruitment of staff.

The Tribunal, having deliberated from 10 October to 2 November 1990, now pronounces the following judgement:

I. The Applicant has been in the service of the United Nations since 1958. In 1967, she was assigned to the Codification Division of the Office of Legal Affairs. In 1980, she was promoted in that Division to the position of Deputy Director for Research and Studies (at the D-1 level). In 1987, her title was changed to that of Deputy Director of the Codification Division. As the Director of the Division, Mr. Kalinkin, was due to retire on 31 January 1989, the Applicant made known her interest in the position (at the D-2 level).

II. However, on 31 October 1988, the position was offered to a national of the Union of Soviet Socialist Republics (USSR), Mr. Vladimir S. Kotliar, and he was appointed on 1 February 1989.

III. In her pleas to the Tribunal, the Applicant contends that her statutory right to due consideration for the post was violated. She requests reparation for the moral and material injury thus sustained. She assesses compensation at the equivalent of six months of her net base salary as at 11 April 1989.

IV. The Applicant also invites the Tribunal to make two recommendations to the Secretary-General:

(a) That he should inform her of vacancies in D-2 positions for which she is qualified and in which she is interested;

(b) That he should establish an appropriate joint machinery to review candidatures for future vacancies in D-2 positions.

V. It goes without saying that the Tribunal has no competence to make regulatory recommendations concerning the establishment of a joint machinery to review candidatures. Its sole function, in the event of disagreement on how candidatures are reviewed, is to verify that the principles laid down in the Charter and General Assembly resolutions, and the necessary guarantees of due process, impartiality and equity in the appointment and promotion of international civil servants, are duly respected.

VI. The Tribunal notes that with regard to the first recommendation which the Applicant would like the Tribunal to make, the Secretary-General, according to the very terms of the contested decision, has undertaken to consider the Applicant "fully and fairly" for any vacant D-2 post for which she is qualified. Accordingly, the Applicant will necessarily have to be informed of such vacancies.

VII. The Tribunal will therefore turn to a question on which the parties are not in agreement. In this case, was the Applicant considered "fully and fairly"? Those were the terms used by the Secretary-General, and the Tribunal cannot but express its complete approval of the formulation.

VIII. The Tribunal notes that until recently, certain Member States did not permit their nationals to accept permanent appointments with the United Nations except on very rare occasions, authorizing them to hold fixed-term appointments only. With some reluctance, the General Assembly acquiesced in the continuation of a long-standing practice by the Secretary-General, in order to prevent a situation which would undermine the principle of equitable geographical distribution of posts (Article 101, paragraph 3, of the Charter), to the detriment of those States. Thus in section I, paragraph 4, of resolution 35/210 of 17 December 1980, the General Assembly requests the Secretary-General:

> "To continue to permit replacement by candidates of the same nationality within a reasonable time-frame in respect of posts held by staff members on fixed-term contracts, whenever this is necessary to ensure that the representation of Member States whose nationals serve primarily on fixed-term contracts is not adversely affected."

IX. It is these circumstances that the post of Director of the Codification Division of the Office of Legal Affairs has been encumbered by Soviet nationals since 1964.

According to information supplied to the Tribunal by the Respondent in his answer, as supplemented on 12 and 14 September 1990, there were 152 Soviet nationals in the Professional and higher categories as at 31 December 1988, of whom only one had a permanent contract, the desirable range for the USSR of posts subject to geographical distribution being 140 to 189.

The Tribunal considers that the Secretary-General, under the terms of resolution 35/210, was justified in designating a Soviet national to fill the post of Director of the Codification Division, although he was not bound to do so.

X. The Tribunal notes that the Secretary-General carefully considered the candidates nominated by the Soviet Mission. On the advice of the Legal Counsel, the Secretary-General rejected two of the candidates and selected a third, Mr. Vladimir S. Kotliar.

XI. The promotion of the Applicant to the post to which she could legitimately aspire was necessarily ruled out by the very selection process described by the Tribunal. Only in the very unlikely event of the failure by all the candidates nominated by the Soviet Mission to meet the highest standards of efficiency, competence and integrity required of international civil servants, could the consideration of the Applicant's candidacy have led anywhere.

XII. The Tribunal believes that the Applicant could have expected to complete what was generally acknowledged to be a brilliant career by becoming titular head of the Codification Division. The Tribunal believes that such a promotion would have been all the more desirable as only very few women reach D-2 positions as directors of United Nations services.

XIII. On the other hand, the Tribunal does not question the Legal Counsel's statement that he was not unaware of the Applicant's interest in being

appointed Director of the Codification Division, and that he had duly considered the possibility of appointing her.

XIV. The Tribunal has also found that in accordance with the practice followed since 1964, as confirmed by General Assembly resolution 35/210 of 17 December 1980, a Soviet national was to be appointed to the post of Director of the Division. The Legal Counsel concluded that such an appointment was in the interest of the United Nations. The Tribunal does not contest his conclusion.

XV. But, the Tribunal is forced to conclude that in the very particular circumstances of this case, even the most serious consideration of the Applicant given in all good faith, could not have had any effect. It could not have led anywhere. The entire exercise therefore proceeded as if the Applicant had not been considered.

XVI. Accordingly, the Tribunal decides to apply to this particular case its established judicial practice in this area (cf. Judgements No. 310, Estabial (1983); No. 362, Williamson (1986) and No. 447, Abbas (1989)). The question therefore arises of the responsibility of the Administration.

XVII. The Tribunal takes note of the Secretary-General's decision that the Applicant "will be fully and fairly considered with other candidates for any vacant D-2 post for which [she is] qualified and in which she is interested".

XVIII. In this connection, the Tribunal notes the Applicant's latest performance evaluation report, prepared by the then Director of the Division, Mr. Kalinkin, dated 27 January 1989. All the ratings were "Excellent". Under item 16, there was the following comment:

> "During the period under review, Ms. Dauchy has added to her previous functions those of Deputy Secretary of the International Law Commission. Her contribution to the efficient organization and smooth conduct of the yearly three-month sessions of this extremely specialized body has been of the highest order both at the administrative and substantive levels."

In commenting on the Applicant's excellent performance, Mr. Kalinkin stated:

> "During the period under review, Ms. Dauchy has broadened her field of responsibility and confirmed her ability of organization and management. She has continued to display all the qualities highlighted in her previous report, which are widely acknowledged by the membership of the legal bodies serviced by the Division. In the present report, I would like to re-iterate with special emphasis my assessment of Ms. Dauchy as a staff member exceptionally devoted to the ideals of the United Nations and embodying the highest standards of efficiency, competence and integrity."

XIX. The Tribunal considers that what the Applicant sustained was essentially a moral injury for which at least partial reparation has been provided by the fact that this judgement notes and places on record her excellent performance. In addition, so as to provide full reparation for the injury sustained by the Applicant, the Tribunal decides to award her compensation in the amount of US$ 5,000.

XX. Taking into account the Secretary-General's decision to consider the Applicant "fully and fairly ... with other candidates for any vacant D-2 post for which [she is] qualified and in which she is interested", the Tribunal expresses the hope that the Secretary-General will carry out this decision at the earliest opportunity.

XXI. For the foregoing reasons, the Tribunal makes the following ruling:

1. The Tribunal is competent to hear the application, which is receivable.

2. This judgement, whose contents provide appropriate partial reparation, shall be included in the Applicant's official status file.

3. The Respondent is ordered to pay to the Applicant the sum of US$ 5,000 in damages.

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XXII. All the Applicant's other pleas are rejected.

(Signatures)

Roger PINTO
President

Ahmed OSMAN
Vice-President

Francisco A. FORTEZA
Member

New York, 2 November 1990

R. Maria VICIEN-MILBURN
Executive Secretary

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ADMINISTRATIVE TRIBUNAL

Judgement No. 493

Case No. 479 : Mr. Z

Against: The United Nations Joint Staff Pension Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; M. Ahmed Osman, Vice-President; M. Samar Sen;

Whereas, on 17 October 1988, Mr. Z, a former staff member specifically recruited by the United Nations Children's Fund, hereinafter referred to as UNICEF, filed an application containing the following pleas:

"II. Pleas

In accordance with article 48 of the Regulations of the United Nations Joint Staff Pension Fund (...),

In view of articles 7, 9 and 14 of the Statute of the Administrative Tribunal,

The Applicant requests the Tribunal:

1. To annul the decision of the Standing Committee of the United Nations Joint Staff Pension Board of 20 to 24 June 1988 (...) confirming the decision of the Staff Pension Committee of 29 June 1987 (...) and upheld by that body on 24 November 1987 (...) following a request for review made by the Applicant, who was requesting that he should be granted a disability benefit under article 33 of the Regulations of the United Nations Joint Staff Pension Fund and in accordance with the provisions of section H of the Fund's administrative rule (...);

2. To declare and to rule:

(a) That, when he separated from service, the Applicant was incapacitated for further service at UNICEF reasonably compatible with his abilities, within the meaning of article 33(a) of the Regulations of the United Nations Joint Staff Pension Fund (...);

(b) That the Applicant is therefore entitled to a disability benefit under article 33 of the Regulations of the United Nations Joints Staff Pension Fund, as from 31 March 1987, the date of his separation from service;

3. Incidentally, to declare and to rule that neither the Secretary of the Pension Fund nor the Pension Board have any justification for refusing a participant the right to representation by counsel in requests for review and appeals to organs of the Fund.

4. In addition, to order:

(a) That payment of the monthly benefit payable to the Applicant should start, at the latest, on the last working day of the second full month following the date of the communications of the judgement of the Tribunal to the Respondent;

(b) That the United Nations Joint Staff Pension Fund should pay to the Applicant a sum corresponding to the total compensation payable to the Applicant as from 31 March 1987, the date of his separation from service, in the following manner: the entire sum as soon as it can reasonably be paid; failing that, 50 per cent of a reasonable estimate of the outstanding amounts, payable at the latest on the last day of the first full month following the date of the communication of the judgement of the Tribunal to the Respondent, the balance being payable at the latest and in full on the last day of the second full month following the date of the communication of the judgement of the Tribunal to the Respondent;

(c) That, in the event of failure to execute the judgement of the Tribunal duly with respect to the method of payment specified, the Respondent should pay to the Applicant, on the full amounts outstanding not paid as disability benefit and for the duration of the failure to pay the outstanding amounts, interest in an amount equal to the prime rate applicable in New York on the day of payment, as published in The Wall Street Journal, increased by one point;

5. As a secondary consideration, to order the Respondent to pay to the Applicant the symbolic sum of one (1) United States dollar as damages, in compensation for the moral and material injury to him resulting from abnormal tensions and difficulties - particularly in view of the Applicant's poor health and the fact that the Applicant is unable to obtain gainful employment in keeping with his level of skills - caused by the summary, inconsistent decisions, not accompanied by a statement of reasons, reached by the Respondent following the request for disability benefit filed by the Applicant with the United Nations Joint Staff Pension Fund in accordance with the Fund's Regulations;

6. Lastly, to decide that the Applicant's name shall not be mentioned in the copies and extracts of the text of its judgement."

Whereas the Respondent filed his answer on 30 June 1989;

Whereas the Applicant filed written observations on 3 August 1989;

Whereas, under article 10 of the Rules of the Tribunal, the President of the Tribunal put questions to the Respondent on 26 September 1989, and the Respondent answered the questions on 4 October 1989;

Whereas, on 5 October 1989, the Applicant submitted written comments on the Respondent's answers to the questions put by the Tribunal;

Whereas, on 5 October 1989, the Respondent submitted an additional document;

Whereas, on 9 October 1989, the Applicant submitted an additional document;

Whereas, on 11 October 1989, the Applicant submitted additional written comments on the document submitted by the Respondent on 5 October 1989;

Whereas, on 20 October 1989, the Respondent submitted additional observations on the preceding communications from the Applicant;

Whereas, on 24 October 1989, the Tribunal put further questions to the Respondent and the Respondent answered the questions on 30 October 1989, also submitting an additional document;

Whereas, on 2 November 1989, the Applicant submitted additional observations;

Whereas, on 29 November 1989, the Tribunal decided to defer consideration of the case to its following session, in spring 1990, and under article 17 of its rules put questions to the Respondent;

Whereas, on 9 January 1990, the Respondent answers the questions put by the Tribunal and submitted additional documents;

Whereas, on 29 January 1990, the Applicant filed and additional communication and submitted further documents;

Whereas, on 1 May 1990, the Tribunal put further questions to the Respondent;

Whereas, on 7 May 1990, the Applicant filed an additional communication and submitted further documents;

Whereas, on 11 May 1990, the Respondent answered the questions put by the Tribunal;

Whereas, on 31 May 1990, the Tribunal once again decided to defer consideration of the case to its following session, in autumn 1990;

Whereas, on 7 August 1990, under article 10 of the Rules of the Tribunal, the President of the Tribunal put questions to the parties, simultaneously requesting the Applicant's consent to the production of additional documents that were confidential, which consent the Applicant gave on 19 August 1990;

Whereas, on 29 August 1990, the Applicant filed additional written comments and submitted further documents;

Whereas, on 18 September 1990, the Director of the United Nations Medical and Employee Assistance Division (Medical Service) submitted a number of documents that the Tribunal had requested;

Whereas, on 23 October 1990, the Applicant filed an additional communication and submitted a further document;

Whereas, on 30 October 1990, the Respondent filed an additional communication;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 26 June 1984, on a fixed-term contract for two years and five days at the P-4 level, as a Finance Officer. In March 1986, as a result of a recommendation by the Comptroller stating detailed reasons, the Applicant's contract was renewed for a two-year period, until 30 June 1988. Immediately thereafter, the Applicant's health started to deteriorate owing to an acute psychotic illness that had a negative effect on his work.

In May 1986, the UN Medical Director examined the Applicant and advised him to take "immediate leave in order to protect UNICEF and not to harm the Organization any further". In accordance with Personnel Directive PD/2/80/Rev.1, entitled "Medical Standards and Clearances" (Administrative rules applicable to medical clearance for employment), the Applicant was classified as "2A", that is to say, he was given the classification of "candidates who have a correctible medical impairment and are only eligible for employment after this has been corrected or candidates who have had a serious medical problem and who cannot be cleared yet for employment". At the request of the UN Medical Director, on 15 August 1986, the Applicant, the Comptroller and a staff officer met to discuss the Applicant's health and work. According to a note drawn up for the record by the staff officer, the UN Medical Director indicated that the Applicant could "perform normally in his present functions" but "also made it clear that based on [Mr. Z's] recent illness, it [was] up to Management, within its discretion, to decide on the type of work which [could] be assigned to him." The staff officer indicated that if the Applicant had been given a "2A" classification before the signing of his contract, UNICEF would not have renewed his contract.

On 19 December 1986, the Comptroller informed the Applicant that his post was being abolished as of 31 December 1986 and that he would be separated from the Organization on 31 March 1987. The three-month period running from 1 January 1987 to 31 March 1987 would be regarded as a notice period during which he would be temporarily assigned to the Greeting Card Operation.

In the course of the procedure started by the Applicant, concerning the establishment of a medical board to determine whether his health justified payment of a disability benefit, which will be described below, the notes drawn up by the Medical Service indicated that the Deputy Director of Personnel, who was the Applicant's former superior, had notified the Medical Service that the Applicant had been given a very simple assignment in March 1987, to pass the time (pending his separation from service, which was to take place on 31 March 1987) which did not require his daily presence in the office. The Applicant had, therefore, not been subjected to any tension due to his work. However, on 12 March 1987, the Director, Greeting Card Operation, made the following assessment of the Applicant's work on the assignment in question:

> "During his assignment to GCO [the Greeting Card Operation] [from 1 January to 31 March 1987] [the Applicant] carried out an assessment of the use of commercial media (TV, radio and print) as practised by five international humanitarian agencies working in the area of child development.
>
> Through skillful negotiations and discussions with these organizations [the Applicant] was able to obtain some valuable information to guide our future activities in this area."

However, a medical certificate made out by Dr. Francis Mas, the Applicant's attending physician in New York, on 29 May 1987, shows that the Applicant "remained euthymic under close medical supervision until March 1987, when he suffered an abrupt relapse into a very severe manic episode which included auditory hallucinations, as well as paranoid and grandiose delusions".

On 12 February 1987, the Applicant requested the Director of Personnel to submit his case to the Appointment and Promotion Committee so that the Committee might find him a suitable post in the Organization. He also asked whether he qualified for a disability benefit under article 33 of the Regulations of the United Nations Joint Staff Pension Fund (the Pension Fund). In a letter dated 24 February 1987, the Director of Personnel informed the Applicant that he would submit his case to the Appointment and Promotion Committee, and indicated that, as far as his entitlement to a disability benefit was concerned, "unless the Medical Director [was] prepared, based on medical evidence, to recommend [him] to the Pension Board for disability benefit ...", UNICEF had "no grounds" for requesting such a benefit.

In a letter dated 11 March 1987, the Applicant requested the Director of Personnel to discharge him "on medical grounds" and to help him "claim from any available source the maximum compensation benefits available for a staff member being incapacitated in the course of duty." In another letter dated 12 March 1987, the Applicant confirmed that he accepted the "[Administration's] proposal of a termination indemnity equivalent to five and one half months of salary without prejudice to [his] normal entitlements", and that he accepted "not to have [his] case reviewed by the

APC [Appointment and Promotion Committee]", since that would be a "futile exercise considering the lack of employment opportunity for [him] in UNICEF at the time."

In a letter dated 25 March 1987 addressed to the Secretary of the United Nations Joint Staff Pension Board (the Pension Board)) in accordance with the Pension Fund administrative rule H.4(a), the Applicant requested the Pension Fund to award him a disability benefit. In a note dated 14 April 1987, the UN Medical Director informed the Secretary of the Pension Board as follows:

> "Because of an acute psychotic illness last year, [Mr. Z] is medically classified as 2A - however, he has been at work for several months. In my view, he would not qualify for a pension disability benefit."

On 31 March 1987, the Applicant was separated from service with UNICEF on the date on which his last fixed-term contract expired.

On 14 May 1987, the Secretary of the Pension Board transmitted the UN Medical Director's opinion to the Applicant, and on 3 June 1987, the Applicant submitted further documents in support of his application.

In a memorandum dated 22 June 1987, the UN Medical Director communicated to the Secretary of the Pension Board his evaluation of the Applicant's health, stating the following:

> "...
>
> Because of his 2A medical classification (which should continue for at least five years), [Mr. Z] is not medically cleared for a position in other UN organizations. Also, many non-UN organizations are unlikely to recruit him, at the present time, because of his recent medical history.
>
> However, if [Mr. Z's] post had not been abolished earlier this year, he could have continued working in UNICEF (like other staff members, in the 'UN system', who have the same psychiatric condition). Thus, the possibility of [Mr. Z] receiving a pension disability benefit, which is his expectation, cannot be decided on medical considerations alone."

In a letter dated 2 July 1987, the Secretary of the Pension Board informed the Applicant that the United Nations Staff Pension Committee (the Pension Committee) had considered his application for a disability benefit

and decided unanimously that he was not entitled to a disability benefit since he was not "incapacitated for further service in a member organization", within the meaning of article 33(a) of the Pension Fund's Regulations when he separated from the service of UNICEF on 31 March 1987. In support of its decision, the Pension Committee also noted that:

> "a) You separated on 'agreed termination', although your fixed-term contract would not have expired until 30 June 1988;
>
> b) You were not terminated on medical grounds; and
>
> c) At the time of your separation UNICEF had apparently taken steps aimed at abolishing your post."

On 21 July 1987, the Applicant requested the Pension Committee to review its decision. In a letter dated 29 July 1987, the Applicant was informed that his case would be reviewed at the next meeting of the Committee and that, if he wished, a medical board could be established to assist the Committee in the reconsideration of his case, in accordance with the Pension Fund's administrative rule K.7. In a letter dated 16 August 1987, the Applicant requested that a medical board should be set up and named Dr. Francis Mas as his designated physician to sit on the board, on which Dr. Michael Irwin, Medical Director, representing the Organization, and Dr. Nathaniel Kwit, the third member of the board, selected by Drs. Mas and Irwin would also serve.

On 21 August 1987, the Medical Service discussed the membership of the Medical Board with a Senior Legal Officer in the Pension Fund's Secretariat, who recorded the Pension Fund's consent to the appointment of Drs. Mas and Kwit as members of the Board. In its answer of 18 September 1990, to the questions put by the President of the Tribunal on 5 September 1990, the Respondent indicated that Drs. Mas and Kurt had served as consulting physicians to the Medical Service for a long time.

The Medical Board met on 10 September 1987, and unanimously adopted the following conclusion:

> "Based on the evidence available to it, the Board believes that [Mr. Z] was apparently able to work, while under medical supervision, on 31 March 1987, and could have continued working beyond that date if his UNICEF P-4 post had still existed on 1 April 1987.

...

> Because [Mr. Z] was able to work, while receiving regular medical care from his personal physician, on 31 March 1987, the Board does not believe that there were sufficient medical reasons to terminate his appointment on that date.
>
> The Board has also noted that [Mr. Z] is in a paradoxical situation as his UN medical classification is now 2A. However, he is presently fit to return to UNICEF - his 'parent organization'. But, he will find it very difficult to obtain further employment with other UN and non-UN organizations, during the next few years (UN system - five years), because of his recent medical history and classification."

On 24 November 1987, at its 234th meeting, the Pension Committee decided unanimously to uphold its earlier decision to deny the Applicant's request for the award of a disability benefit. The Applicant was informed thereof in a letter dated 30 November 1987, from the Secretary of the Pension Board.

On 12 February 1988, the Applicant lodged an appeal against that decision with the Standing Committee of the Joint Staff Pension Board (the Standing Committee).

At its 168th meeting, held from 20 to 24 June 1988, the Standing Committee considered Mr. Z's appeal against the Pension Committee's decision to deny his application for a disability benefit and decided unanimously to uphold the Pension Committee's decision The Applicant was so informed in a letter from the Secretary of the Pension Board dated 18 July 1988.

On 17 October 1988, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant is suffering from an illness, which became apparent in March/April 1986. His disease was immediately detected and recognized by the competent administrative and medical authorities of the employer organization as soon as it became apparent.

2. The Applicant's illness is disabling and was recognized as such by the medical and administrative authorities of the employer organization.

3. The disabling nature of the illness has affected and continues to affect the Applicant's current and potential employment relationship with the organizations in the United Nations system.

4. The illness and hence its disabling effects are of long duration, if not permanent, and existed at the time of the Applicant's separation from service and continued to exist as of the date on which the application was filed.

5. The Applicant meets the requirements of article 33(a) of the Pension Fund's Regulations.

Whereas the Respondent's principal contentions are:

1. The Applicant was not "incapacitated for further service in a member organization" on the date of separation from service.

2. The Applicant was not terminated "on medical grounds".

3. The Applicant has not become disabled within the meaning of article 33 of the Pension Fund's Regulations since 31 March 1987.

4. The Applicant has been accorded due process.

The Tribunal, having deliberated from 24 October to 8 November 1989 in New York, from 1 to 21 May 1990 in Geneva, and from 18 October to 2 November 1990 in New York, now pronounces the following judgement:

I. The Applicant maintains that he is entitled to the award of a disability benefit under article 33 of the Regulations of the Pension Fund. The Tribunal notes that the composition of the Medical Board that examined the Applicant was not such as to prevent the Board's independence from being challenged. Dr. Francis Mas, the doctor selected by the Applicant to represent him on the Medical Board had been recommended to him by the United Nations Medical and Employee Assistance Division (Medical Service) as an attending physician; according to the Respondent, Dr. Mas has been "a consultant physician for the Medical Service for a long time". He could and, in accordance with the judicial practice of the Tribunal, no doubt should have declined to give an opinion and should not have agreed to become

a member of the Medical Board and to assist the Applicant in his capacity as attending physician before the Board. What is even more serious, Dr. Nathaniel Kwit, who was selected jointly by Dr. Mas and the Medical Director, has been a regular consultant to the Medical Service since 1969. In the Tribunal's view, the appointment of this third member does not meet the requirement that the Board should be independent. (Cf. Judgements No. 91, Miss Y (1964) and No. 114, Kherderian (1968)).

II. The Respondent cannot properly argue that the Applicant did not raise any objection to the membership of the Board. In the Tribunal's view, the Applicant, who was suffering from a very serious chronic mental disease cannot be regarded as having been fully capable of freely taking a decision. Moreover, the procedural irregularity resulting from the fact that the three members of the Board had close links with the Medical Service cannot be covered up, even if the individual concerned, sound in body and mind, gave his consent.

III. In these circumstances, the Tribunal believes that the decision of the Standing Committee of 18 July 1988, upholding the decision of the Pension Committee of 24 November 1987, is invalid owing to a substantial procedural irregularity.

IV. The Respondent must therefore set up a new medical board, made up of a representative of the Applicant and a third member appointed by the first two members who is not a consultant to the United Nations or a member organization of the Pension Fund, under administrative rule K.7(b) of the Pension Fund. The board in question must determine the Applicant's state of health on the date of his separation from service (31 March 1987) and try to ascertain, in accordance with the actual provisions of article 33 of the Pension Fund's Regulations; (i) whether, on the date of his separation from service, 31 March 1987, the Applicant was "incapacitated for further service in a member organization [of the Pension Fund] reasonably compatible with

his abilities ..."; and (ii) whether such incapacitation was "due to injury or illness constituting an impairment to health which is likely to be permanent or of long duration".

It will be for the Pension Committee, on the basis of the medical board's opinion, to take a reasoned decision on the Applicant's request that he should be awarded a disability benefit.

V. In his pleas, as a subsidiary matter, the Applicant requested the Tribunal to order the Respondent to pay the symbolic sum of one (1) United States dollar as compensation for the moral and material injury to him. The Tribunal believes that it is appropriate to accept this request for compensation for the injury to the Applicant resulting from the violation of his right to due process.

VI. On these grounds, the Tribunal, without determining the merits of the case, decides that:

1. The decision of the Standing Committee of 18 July 1988 is annulled.

2. Unless the Respondent decides, after reviewing the case, to grant the Applicant's request for a disability benefit, the procedure must be repeated and the Applicant's application must be submitted, for an opinion, to a medical board made up, in accordance with administrative rule K.7(b) of the Pesnion Fund, of a representative of the United Nations Medical Service, a representative of the Applicant who has not link with the United Nations Medical Service, and a third member, also having no link with the United Nations Medical Service, selected by the first two members, within two months of notification of the present judgement. The medical board shall submit its conclusions within two months of its establishment, and the Respondent shall take a new decision within two months of the date on which the medical board's conclusions are transmitted to it and to the Applicant. The cost of the review shall be borne by the Pension Fund.

3. The Respondent shall pay to the Applicant, by way of compensation, the sum of one (1) United States dollar and shall reimburse the Applicant for the expenses incurred by him in connection with the preceding medical board.

VII. The Tribunal determines that the Applicant's name shall not be mentioned in any of the versions of the present judgement that are to be published.

(Signatures)

Roger PINTO
President

Ahmed OSMAN
Vice-President

Samar SEN
Member

New York, 2 November 1990

R. Maria VICIEN-MILBURN
Executive Secretary

DECLARATION BY SAMAR SEN

I have signed the judgement as the legal arguments advanced are completely acceptable to me and the conclusions drawn from them are logical; however, for similar reasons, I would have preferred an award of adequate monetary compensation for the lack of due process and to eliminate the need to convene another medical board for examining what might have occurred several years ago.

(Signature)

Samar SEN
Member

New York, 2 November 1990